EDITOR'S NOTE

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Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1997

Jeffrey Wills Lusk,

Petitioner,

v.

Federal Adjustment Bureau, Inc.,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

PETITION FOR A WRIT OF CERTIORARI

Jeffrey Wills Lusk
pro se
Counsel of Record
Jeffrey Wills Lusk
P.O. Box 21300
Columbus, Ohio 43221
614 823 9399
Counsel for Petitioner

36 pp

QUESTION PRESENTED

Does the Constitution Of The United States require a Court in an action to privately enforce the federal Fair Debt Collection Practices Act and/or in any properly brought federal action to hear a *pro se* litigant's pleadings and evidence on a fair and impartial basis as if they were presented by an attorney-at-law and at the same time require opposing counsel to refrain from using its pleadings to demean a *pro se* litigant for the purpose of gaining an advantage with the Court by deflecting the Court from verifying opposing counsel's calculated misleading excerpts from case law citations and fairly and impartially evaluating a *pro se* litigant's pleadings and evidence and instead focusing on the Court System's widely held and practiced premise that anything presented by a *pro se* litigant must be regarded as non meritorious and must be considered by a standard different and not equal to that used for a kindred and fellow attorney-at-law.

In The

Supreme Court of the United States

October Term, 1997

No. _____

In re Jeffrey Wills Lusk, on behalf of himself,

Petitioner,

v.

Federal Adjustment Bureau, Inc.,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Ohio

---

PETITION FOR A WRIT OF CERTIORARI

Jeffrey Wills Lusk (the "Appellant"), on behalf of himself, hereby petitions for a writ of certiorari to review the judgment of the Supreme Court of Ohio, filed on October 1, 1997, denying discretionary review of Appellant's appeal.

OPINION BELOW

The Supreme Court of Ohio's judgment is reproduced at page 1a, The Court of Appeals of Ohio's decision is reproduced at page 2a, and The Court of Common Pleas of Franklin County Ohio's decision is reproduced at page 14a of the Appendices to this certiorari petition (hereafter "Pet. App.").

JURISDICTIONAL STATEMENT

The Supreme Court of Ohio's judgment was entered on October 1, 1997, (Pet. App. 1a). This Court's jurisdiction is invoked pursuant to 28 U.S.C. 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Constitution of the United States and the federal Fair Debt Collection Practices Act, codifed at 15 U.S.C 1692 et seq. (hereafter "FDCPA").

STATEMENT OF THE CASE

Appellant sued Respondent Federal Adjustment Bureau, Inc. (hereafter "FEDERAL") for alleged violations of the FDCPA. FEDERAL did not stop attempting to collect upon an assertion of a monetary claim after being properly notified that the assertion of the monetary claim was denied and a request to stop the collection activity was made. Appellant was in the capacity of a third-party plaintiff and FEDERAL was in the capacity of a third-party defendant arising out of Appellant being sued by FEDERAL for an action on an account that never existed. FEDERAL'S

original case against Appellant was dismissed with prejudice. FEDERAL was granted summary judgment on Appellant's third-party claims by the Franklin County Court of Common Pleas. Summary judgment was affirmed by the Franklin County Court of Appeals Tenth Appellate District. The Supreme Court of Ohio denied Appellant's appeal for discretionary review. Appellant asked for a trial and was barred from ever having his open and shut case from being heard on its merits by the granting of summary judgment.

REASONS FOR GRANTING THE WRIT

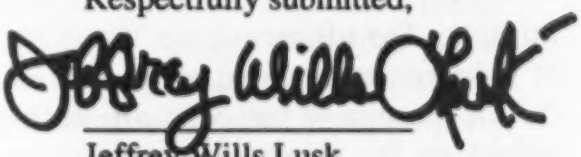
The Writ must be granted because the Supreme Court of Ohio's decision represents an unprecedented encroachment on Appellant's constitutional right to equal protection of the FDCPA, pursuant to Amendment XIV of the Constitution of the United States. Additionally a consumer has a right to act as a private Attorney General on a *pro se* basis to enforce his or her right to private enforcement of the FDCPA. The legislature armed a consumer with a shield against the overly zealous debt collector; this shield is particularly important in our modern computer-driven world and a consumer is entitled to its protection pursuant to the FDCPA. The "Court System" is for the benefit of the litigants. The officers of the "Court System" serve by way of *privilege* as opposed to by way of *right* and as such cannot conspire to prevent a *pro se* litigant from obtaining redress on the merits of his or her complaint at the trial level pursuant to the Constitution of the United States.

CONCLUSION

Since the Federal Trade Commission refuses to enforce the FDCPA on an individual basis a consumer is forced to seek redress through a private enforcement action. The maximum fine for violating the FDCPA is $1,000 and is not worth hiring an attorney to litigate. Although attorney's fees may be awarded the risk is too high for a contingency arrangement. The practical result is that a consumer is forced to seek remedy on a *pro se* basis. It is very unrealistic for a "least sophisticated consumer" to be required to learn the complex legal system to allow for redress of a violation of the FDCPA. Until a realistic administrative procedure is implemented to enable a consumer real redress for violation of the FDCPA the "Court System" is all a consumer has to seek redress. Until the "Court System" is required to hear the evidence and pleadings of a *pro se* litigant in the same light as it would if presented by an attorney-at-law, the FDCPA is rendered moot. The practical result is a consumer is enslaved and rendered helpless against the overly zealous debt collector.

For the reasons set forth above, this petition for a writ of certiorari should be granted.

Respectfully submitted,



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Dated: December 29, 1997

APPENDICES

APPENDIX A

The Supreme Court of Ohio

FILED
OCT 01 1997

1997 TERM

Pache Management Co., Inc.,	:	
Appellee,	:	Case No. 97 - 1365
v.	:	
Jeffrey W. Lusk,	:	
Appellant,	:	
Federal Adjustment Bureau Inc., et al.,	:	ENTRY
Appellees.	:	

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitutional question.

COSTS:

Docket Fees, $40.00, paid by Jeffrey W. Lusk,

(Franklin County Court of Appeals; No. 96APE101302)

/s/ THOMAS J. MOYER
Chief Justice

APPENDIX B

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Pache Management Co., Inc.,	:	
Plaintiff-Appellee,	:	
		No. 96APE10-1302
v.	:	
		(REGULAR CALENDAR)
Jeffrey W. Lusk,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
	:	
Federal Adjustment Bureau, Inc., et al.,	:	
Third Party/Defendants-Appellees.	:	
	:	

D E C I S I O N

Rendered on May 15, 1997

Robert M. Sanders, for appellee Federal Adjustment Bureau, Inc.

Jeffrey W. Lusk, pro se.

APPEAL from the Franklin County Court of Common Pleas.

DESHLER, J.

Defendant/third-party plaintiff-appellant, Jeffrey W. Lusk, appeals from a decision of the Franklin County Court of Common Pleas granting summary judgment for third-party defendant-appellee, Federal Adjustment Bureau, Inc., and overruling Lusk's cross-motion for summary judgment.

The issues in this case are such that only a brief initial recitation of the underlying facts is necessary. Further facts will be developed as necessary in the opinion. This action was originally commenced by Pache Management Co., Inc. ("Pache"), to collect on amounts allegedly owed by Lusk for unpaid rent and repair of damages allegedly inflicted by him upon certain rental property that he had leased from Pache at 502 Dierker Road, Columbus, Ohio. Appellee Federal Adjustment Bureau, Inc. ("FAB") is a collection agency retained by Pache as its agent in an attempt to recover from Lusk. FAB eventually filed suit in the Franklin County Court of Common Pleas on behalf of Pache to recover the amounts alleged owed for unpaid rent and damages to the premises.

Lusk then filed both a counterclaim against Pache and third-party complaints against CBC Companies, Inc. (DBA the Credit Bureau of Columbus) and appellee FAB asserting violations of the federal Fair Credit Reporting Act and the federal Fair Debt Collection Practices Act ("FDCPA"). While the trial court's decision granted summary judgment for both FAB and CBC Companies, appellant's appeal in this matter raises only issues with respect to FAB, and as such only these issues will be addressed in this opinion.

Appellant's amended complaint filed on July 5, 1995 in his third-party action against FAB asserted the following causes of action: that FAB had violated the provisions of 15 U.S.C. §1692 by making false or misleading representations in its communications with him by using a form letter whose format mimicked that of legal process; by implying that the debt owed by appellant constituted a criminal violation; by opening two separate collection accounts for the same debt; by attempting to collect an amount not expressly authorized by the

agreement or instrument creating the alleged debts; by using the term "federal" in its name in order to create the false impression that FAB was an agency of, or affiliated with, the federal government; and by committing mail fraud in violation of 18 U.S.C. §1341, by using the postal service to transmit the above-described documents for the purpose of obtaining money by means of false pretenses.

Lusk's amended complaint demanded damages in the amount of $75,000, further "damages allowed by statute," an injunction against further use of the term "federal" by FAB in its name, and an award of costs and attorney fees.

On February 21, 1996, Lusk filed a motion for leave to further amend his third-party complaint against FAB, proposing the following three additional causes of action: that FAB had violated the provisions of 15 U.S.C. §1681b by obtaining a credit report from TRW Information Services "without permission and without permissible purpose"; that FAB had violated 15 U.S.C. §1681q by obtaining a credit report under false pretenses; and that FAB had violated 15 U.S.C. §1692d by allowing its employee to use an alias in his telephone conversations with Lusk.

The parties having filed cross-motions for summary judgment, the trial court entered a decision on June 25, 1996, ruling on a number of pending procedural and discovery motions then before the court including Lusk's motion to amend his complaint, which was granted. The court then proceeded to deny Lusk's motions for summary judgment against FAB and CBC Companies, and grant the motions for summary judgment filed by FAB and CBC Companies. The underlying

landlord - tenant dispute between Pache and appellant was ultimately settled and is not addressed in this appeal.

Appellant has timely appealed the trial court's decision granting summary judgment in favor of FAB, and brings the following nine assignments of error:

"ASSIGNMENT OF ERROR I

"The Trial Court erred in entertaining and hearing the Motion for Summary Judgment, in light of the fact that Attorney Sanders Counsel for Appellee, received an extension of the dispositive motions' due date to file the Motion for Summary Judgment based upon telling the Court he had depositions scheduled after the dispositive motions' due date, when in fact the record is clear that he never scheduled and/or held any such depositions whatsoever.

"ASSIGNMENT OF ERROR II

"The Trial Court erred in refusing to grant Summary Judgment for Appellant and enter Summary Judgment thereon, in light of the facts that the weight of the evidence was for Appellant and the cases cited were not read and/or interpreted correctly.

"ASSIGNMENT OF ERROR III

"The Trial Court erred in concluding that the actions of Appellee did not violate 15 U.S.C. 1692e (4)(5)(7)(9)(13), in light of the facts that the Trial Court failed to apply the standard of review of 'Least Sophisticated Consumer,' failed to understand, interpret, and apply the law correctly, and totally did not understand well settled law defining a proper 'Action on an Account.'

"ASSIGNMENT OF ERROR IV

"The Trial Court erred in concluding the use of the fictitious name 'Mr. Taylor' by Appellee was not a violation of the federal Fair Debt Collection Practices Act, in light of the fact that the Trial Court failed to correctly understand, interpret, and apply the statutory and case law.

"ASSIGNMENT OF ERROR V

"The Trial Court erred in concluding that the actions of Appellee did not violate 63 U.S.C. 1341,[18 U.S.C. §1341] in light of the fact that the Trial Court failed to recognize that no proper 'Action on an Account' ever existed.

"ASSIGNMENT OF ERROR VI

The Trial Court erred by abusing its discretion by not judging the causes upon their merits, in light of the fact that a Summary Judgment is not a trial upon the merits, but merely a hearing to determine whether or not any factual issues exist that require a trial to determine which side the merits favor.

"ASSIGNMENT OF ERROR VII

"The Trial Court erred in concluding an 'Action on an Account' is 'merely a pleading devise used to consolidate several different claims one party has against another,' in light of the fact that the Trial Court interpreted the well settled case law against what the Courts have held in the cited cases.

"ASSIGNMENT OF ERROR VIII

"The Trial Court erred by abusing its discretion by not ruling upon the motion within rule, releasing the motion from the record on April 17, 1996 without the motion having been ruled upon, denying Appellant his right to trial scheduled for May 6, 1996 without just cause, and then subsequently granting the motion prior to the record being corrected as to the status of the motion.

"ASSIGNMENT OF ERROR IX

"The Trial Court erred in concluding all of the elements necessary to grant the Summary Judgment were satisfied."

The first assignment of error asserts that the trial court erred in hearing FAB's motion for summary judgment because it was filed after the cut-off date for dispositive motions in the case schedule. Appellant Lusk further asserts that counsel for appellee requested an extension to file the summary

judgment motion based upon false information provided to the court that appellee's counsel had scheduled depositions necessary for the summary judgment motion after the cut-off date for the filing of such a motion but before the motion was filed. We note that it is within the sound discretion of a trial court to grant leave to file a summary judgment motion, even if the case has been set for trial. *Woodman v. Tubbs Jones* (1995), 103 Ohio App.3d 577; *Paramount Supply Co. v. Sherlin Corp.* (1984), 16 Ohio App.3d 176; *Indermill v. United Savings, Inc.* (1982), 5 Ohio App. 3d 243. In light of the rate at which discovery was conducted by the parties in this matter, and considering as well the fact that appellant's own motion to further amend his pleadings was then pending before the court, we find no abuse of discretion on the part of the trial court in accepting and ruling on the merits of FAB's summary judgment motion. Appellant's first assignment of error is accordingly overruled.

Appellant's assignments of error two, three, four, five, six, seven and nine all address the trial court's denial of summary judgment for appellant and grant of summary judgment in favor of appellee, and will be addressed together. Appellant raises various instances of alleged error under this general issue.

The trial court's decision in this matter was rendered on summary judgment. In accordance with Civ.R. 56, summary judgment may be granted only if, construing the evidence most strongly in favor of the nonmoving party, no genuine issue of material fact exists, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which is adverse to the nonmoving party. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. "A motion for summary judgment forces the nonmoving party to

produce evidence on any issue for which that party bears the burden of production at trial." *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, paragraph three of the syllabus.

Appellant raises the following issues in relation to the trial court's grant of summary judgment. First, whether FAB violated the provisions of the FDCPA, specifically 15 U.S.C. §1692e, in permitting the use of a fictitious "desk name" by a collector when dealing with appellant. Second, whether FAB violated the provisions of 15 U.S.C. §1692e(1), by engaging in the false and misleading practice of implying that the collection agency was affiliated with the United States government through the use of the term "federal" in its name. Third, whether FAB violated the provisions of 15 U.S.C. §1692e(7) by implying or representing in its communication with appellant that his debt was a result of or constituted a crime on his part.

Appellant also raises in this appeal issues related to whether the collection effort by FAB violated further FDCPA provisions because it was based upon contract, rather than upon an account, as was stated in various communications from FAB to appellant.

According to the "congressional findings and declaration of purpose" of the FDCPA, stated under 15 U.S.C. §1692(e):

> "It is the purpose of this subchapter to eliminate abusive debt collection practices by debt collectors, to insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged, and to promote consistent State action to protect consumers against debt collection abuses."

15 U.S.C. §1692k(d) provides for state court jurisdiction over FDCPA

actions:

> "An action to enforce any liability created by this subchapter may be brought in any appropriate United States district court without regard to the amount in controversy, or in any other court of competent jurisdiction, within one year from the date on which the violation occurs."

In determining whether a collection agency's actions are misleading or otherwise proscribed by the FDCPA, a court must look to an objective standard based upon whether the hypothetical "least sophisticated consumer" would have been mislead by the practices or communications of the collection agency. This standard serves to ensure the protection of all consumers under the act, no matter how excessively naive and trusting, against deceptive debt collection practices. *Clomon v. Jackson* (1993), 988 F.2d 1314; *Graziano v. Harrison* (1991), 950 F.2d 107.

Addressing first appellant's contention that there remains a material issue of fact as to whether the term "federal" in the name of a collection agency creates the misleading impression that the agency is affiliated with, or represents, the federal government, we examine the materials submitted by the parties in support of their respective motions for summary judgment. The letterhead employed by FAB contains, in large bold-faced type, the logo "FABCO" across the top of the page. Down the left hand margin is the full name of the corporation, "Federal Adjustment Bureau, Inc." Below this, in slightly smaller type, is the notice "a private corporation since 1943." Appellant has submitted no cases, nor has our own research discovered any, which establish that the bare use of the term "federal" in the corporate or trade name of a collection agency of itself creates the misleading implication or representation that the federal

government is involved in the collection process. Although this court can certainly conceive of circumstances under which excessive emphasis upon this term might create such an impression, the format and content of the communications from FAB to appellant, and especially the reasonably prominent mention of private corporate status, appear to comply with the spirit and letter of the FDCPA. We therefore find that the trial court did not err in granting summary judgment for FAB upon this count of appellant's second amended complaint.

We next turn to appellant's assertion that the use of "desk names" by appellee's employees constituted a deceptive collection practice under 15 U.S.C. 1692(e), which provides, above a series of specific proscribed types of conduct, the general prohibition that "[a] debt collector may not use any false, deceptive or misleading representation or means in connection with the collection of any debt." Appellant finds support for this proscription of "desk names" in *Bingham v. Collection Bureau, Inc.* (1981), 505 F.Supp. 864. We find more persuasive, however, the position that the use of an alias by a debt collector, for various valid commercial reasons, including the prevention of later harassment by debtors, "can hardly be termed harassment, oppression, or abuse" under the FDCPA. *Wright v. Credit Bureau of Georgia, Inc.* (N.D.Ga. 1982), 548 F.Supp. 591, 597. This appears to be the position adopted by Ohio courts in the limited amount of precedent found on this practice. See, *e.g.*, *Kleczy v. First Federal Control, Inc.* (1984), 21 Ohio App.3d 56. We therefore find that the trial court did not err in concluding that there remained no material issue of fact with respect to any violation of the FDCPA with respect to the use of the "desk names" by

appellee, and the trial court did not err in granting summary judgment for appellee on this count of appellant's second amended complaint.

Next we turn to appellant's assertion that there remains a material issue of fact as to whether FAB violated the provisions of 15 U.S.C. §1692e(7), which prohibits "[t]he false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer." Appellant asserts a violation by FAB on the basis of a letter received from FAB dated February 22, 1995, in which reference was made to a possibility that appellant had committed criminal mischief in allegedly damaging the apartment. We find that the text of this letter is not violative of 15 U.S.C. §1692e(7); although the reference to possible criminal mischief is irrelevant to the collection matter appellant did not establish a material issue of fact as to whether this was done in order to "disgrace" him, nor do the statements rise to the level of a "false representation or implication" that appellant had committed a crime. Accordingly, we find that the trial court did not err in this respect.

Next we turn to appellant's assertion that FAB's attempt to collect in an "action on an account," when the underlying debt was actually the result of a lease contract between appellant and Pache, constitutes a deceptive collection practice. Appellant particularly strives to establish that no account existed between him and Pache, and cites extensive Ohio case law in the definition of an account as a pleading device. Even if appellant were to establish that no account could be established for pleading purposes, we do not find that this would form the basis for any allegation of deceptive collection practices on the part of FAB as it bears no relation to the validity or amount of the alleged

debt. In accordance with the foregoing, appellant's second, third, fourth, fifth, sixth, seventh, and ninth assignments of error are without merit and are overruled.

Appellant's eighth assignment of error asserts that the trial court erred in ruling on appellee's motion for summary judgment after this, and numerous other motions then pending, had been released from the record by the trial court. The trial court apparently mistakenly believed that the motions had been ruled upon by the magistrate, and when the mistake was realized the motions were reinstated and ruled upon.

Appellant has not articulated any prejudice to him from this handling of the motions by the trial court, especially since, with the exception of the dispositive summary judgment motions, many of the court's motion rulings were favorable to appellant. With respect to the summary judgment motions, no prejudice from delay or otherwise can be ascertained. Accordingly, there was no prejudicial error on the part of the trial court in addressing the parties' motions, and appellant's eighth assignment of error is overruled.

In accordance with the foregoing, appellant's first, second, third, fourth, fifth, sixth, seventh, eighth and ninth assignments of error are without merit and are overruled. The judgment of the Franklin County Court of Common Pleas granting summary judgment for appellee is affirmed.

Judgment affirmed.

PETREE and CLOSE, JJ., concur.

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Pache Management Co., Inc.,	:	
Plaintiff-Appellee,	:	95CV-3444 No. 96APE10-1302
v.	:	(REGULAR CALENDAR)
Jeffrey W. Lusk,	:	
Defendant/Third-Party Plaintiff-Appellant,	:	
Federal Adjustment Bureau, Inc.,	:	
Third Party/Defendants-Appellees.	:	

JOURNAL ENTRY OF JUDGMENT

For the reasons stated in the decision of this court rendered herein on May 15, 1997, appellant's first, second, third, fourth, fifth, sixth, seventh, eighth and ninth assignments of error are overruled and the decision entered by the Franklin County Court of Common Pleas is hereby affirmed.

PETREE, DESHLER & CLOSE, JJ.

By _____
Judge Dana A. Deshler

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CLERK OF COURTS

cc: Robert M. Sanders, Esq.
Jeffrey W. Lusk, *pro se.*

APPENDIX C

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

PACHE MANAGEMENT CO., INC., etc.,

Plaintiff,

v. Case No. 95CVH05-3444

JEFFREY W. LUSK, Judge O'Neill

Defendant and Third-Party Plaintiff,

v.

CBC COMPANIES, INC., etc., et al.,

Third-Party Defendants.

DECISION AND ENTRY DENYING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S DECEMBER 12, 1995 MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S DECEMBER 29, 1995 MOTION FOR SUMMARY JUDGMENT; GRANTING THIRD-PARTY DEFENDANT FEDERAL ADJUSTMENT BUREAU, INC.'S MARCH 27, 1996 MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S JANUARY 9, 1996 MOTION FOR SUMMARY JUDGMENT; GRANTING THIRD-PARTY DEFENDANT CBC COMPANIES, INC.'S FEBRUARY 9, 1996 MOTION FOR SUMMARY JUDGMENT; DENYING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S APRIL 4, 1996 MOTION TO DISMISS; DENYING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S FEBRUARY 29, 1996 MOTION FOR SANCTIONS; GRANTING DEFENDANT LUSK'S FEBRUARY 21, 1996 MOTION FOR LEAVE TO AMEND COUNTERCLAIM; GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S FEBRUARY 21, 1996 MOTION FOR LEAVE TO AMEND THIRD-PARTY COMPLAINT; GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S MARCH 27, 1996 MOTION FOR LEAVE TO AMEND THIRD-PARTY COMPLAINT; GRANTING IN PART AND DENYING IN PART DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S DECEMBER 12, 1995 MOTION FOR ORDER WITH RESPECT TO ANSWERS AND ADMISSIONS; GRANTING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S JANUARY 26, 1996 MOTION FOR LEAVE TO AMEND; GRANTING PLAINTIFF PACHE MANAGEMENT CO., INC.'S DECEMBER 20, 1995 MOTION FOR EXTENSION OF TIME TO RESPOND TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT; DEEMING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S JANUARY 10, 1996 MOTION FOR PROTECTIVE ORDER TO BE MOOT; DEEMING DEFENDANT AND THIRD-PARTY PLAINTIFF LUSK'S FEBRUARY 29, 1996 MOTION TO AMEND CASE SCHEDULE TO BE MOOT

Rendered this 24 day of June, 1996.

O'Neill, D., J.

Before the Court are the following motions:

1. Defendant and Third-Party Plaintiff Lusk's (hereinafter "Lusk") December 12, 1995 Motion for Summary Judgment. Plaintiff Pache Management Co., Inc. (hereinafter "Pache") filed a Memorandum Contra on January 19, 1996. Lusk filed a Reply Memorandum on January 25, 1996.

2. Lusk's December 29, 1995 Motion for Summary Judgment. Third-Party Defendant Federal Adjustment Bureau, Inc. (hereinafter "FAB") filed a Memorandum Contra on January 12, 1996. Lusk filed a Reply Memorandum on January 18, 1996.

3. FAB's March 27, 1996 Motion for Summary Judgment. Lusk filed a Memorandum Contra on April 2, 1996. FAB filed a Reply Memorandum on April 8, 1996.

4. Lusk's January 9, 1996 Motion for Summary Judgment. Third-Party Defendant CBC Companies, Inc. (hereinafter "CBC") filed a Memorandum Contra on February 9, 1996. Lusk filed a Reply Memorandum on February 21, 1996.

5. CBC's February 9, 1996 Motion for Summary Judgment. Lusk filed a Memorandum Contra on February 21, 1996.

6. Lusk's April 4, 1996 Motion to Dismiss. Pache filed a Memorandum Contra on April 22, 1996. Lusk filed a Reply Memorandum on April 26, 1996.

7. Lusk's February 29, 1996 Motion for Sanctions. Pache filed a Memorandum Contra on March 6, 1996. Lusk filed a Reply Memorandum on March 13, 1996.

8. Lusk's February 21, 1996 Motion for Leave to Amend Counterclaim. This motion is unopposed.

9. Lusk's February 21, 1996 Motion for Leave to Amend Third-Party Complaint. Lusk filed a Reply Memorandum on March 13, 1996. The Court did not find a copy of a Memorandum Contra filed by CBC in the file or listed on the Court's computerized docket.

10. Lusk's March 27, 1996 Motion for Leave to Amend Third-Party Complaint. This motion is unopposed.

11. Lusk's December 12, 1995 Motion for Order with Respect to Answers to Admissions. FAB filed a Memorandum Contra on December 26, 1995. Lusk filed a Reply Memorandum on December 29, 1995.

12. Lusk's January 26, 1996 Motion for Leave to Amend. For good cause shown, Lusk's Motion for Leave to Amend is well-taken and is GRANTED.

13. Pache's December 20, 1995 Motion for Extension of Time to Respond to Defendant's Motion for Summary Judgment. Lusk filed a Memorandum in Opposition on December 27, 1995. For good cause shown, Pache's Motion of Extension of Time to Respond to Defendant's Motion for Summary Judgment is well-taken and is GRANTED.

14. Lusk's January 10, 1996 Motion for Protective Order. As the date for the deposition for which Lusk wanted a protective order issued has passed, the Court deems Lusk's Motion for Protective Order to be MOOT and declines to rule on it.

15. Lusk's February 29, 1996 Motion to Amend Case Schedule. This motion is unopposed. Mr. Lusk seeks to have the discovery cut-off date extended to April 12, 1996. As this date has already passed, and in light of the April 26, 1996 Magistrate's Order

disallowing the filing of any additional motions, the Court deems Lusk's Motion to Amend Case Schedule MOOT and declines to rule on it.

I. Motions for Summary Judgment

A motion for summary judgment may be granted where there are no genuine issues of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds can come to but one conclusion, which conclusion is adverse to the non-moving party. Civ. R. 56(C). A conclusory assertion that the non-movant does not have sufficient evidence to prove its case will not discharge the movant's initial burden under Civ. R. 56(C). Dresher v. Burt (1996), 75 Ohio St.3d 280, 293, ____ N.E.2d ____, ____. Instead, the movant "must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claim." Id. The motion for summary judgment must be denied if the movant fails to satisfy its initial burden. However, if the initial burden is meet, the non-movant must satisfy its burden, as set forth in Civ.R. 56(E). Specific facts must be produced demonstrating a genuine issue for trial. If the non-movant fails to respond in such a manner, a granting of summary judgment for the movant may be appropriate. Id.

A. Lusk's December 12, 1995 Motion for Summary Judgment

Lusk maintains there are no genuine issues of material fact thus entitling him to judgment as a matter of law. Pache asserts

that Lusk has failed to meet his burden as required by Ohio Civ. R. 56 making summary judgment inappropriate.

"An 'action on an account' is 'merely a pleading device used to consolidate several different claims one party has against another." Arthur v. Parenteau (1995), 102 Ohio App.3d 302, 304, 657 N.E.2d 284, 285, citing AMF, Inc. v. Mravec (1981), 2 Ohio App.3d 29, 31, 440 N.E.2d 600, 603. In this context, account refers to the type of relationship that exists between the parties, not to a specific book or record. Gabriele v. Reagan (1988), 57 Ohio App.3d 84, 87, 566 N.E.2d 684, 687, citing American Security Service v. Baumann (1972), 32 Ohio App.2d 237, 289 N.E.2d 373, paragraph four of the syllabus. As a result, the nature of the action is contractual and all the elements of a contract action must be proven. Id.

In the current dispute, Mr. Lusk argues that since Pache admitted in an interrogatory answer he did not open an account with it, there is no cause of action against him. However, the wording of the interrogatory was such that is does not cover the manner in which account is used in this context. The current dispute involves an action on an account. Mr. Lusk entered into a lease agreement with Pache and allegedly breached the lease. Since a lease is a contract, the current action is contractual. However, Mr. Lusk has not presented any evidence to support an argument that the elements of a contract action are not present.

Mr. Lusk also maintains Pache is barred by the doctrine of laches from proceeding with this action agai st him. Laches is "an

omission to assert a right for an unreasonable and unexplained length of time, under circumstances prejudicial to the adverse party." State ex rel. Wean United, Inc. v. Indus. Comm. (1993), 66 Ohio St.3d 272, 275, 611 N.E.2d 828, 830, citing Connin v. Bailey (1984), 15 Ohio St.3d 34, 35, 472 N.E.2d 328, 329. However, delay in and of itself is not sufficient to invoke the doctrine of laches. Instead, the party benefitting from the doctrine must show material prejudice was caused by the delay of the party asserting the claim. State ex rel. Case v. Indus. Comm. (1986), 28 Ohio St.3d 383, 385, 504 N.E.2d 30, 33, citing Smith v. Smith (1959), 168 Ohio St. 447, 156 N.E.2d 113, paragraph three of the syllabus. In addition, where there is a relevant statute of limitations, to successfully assert laches before the expiration of the statute of limitations there must be a clear showing a special circumstance. Thirty-Four Corp. v. Sixty-Seven Corp. (1984), 15 Ohio St.3d 350, 353, 474 N.E.2d 295, 297.

Mr. Lusk asserts the year delay between the damage occurring to his apartment and the filing of the lawsuit by Pache is such to assert the doctrine of laches. He maintains he was materially prejudiced because he was unable to preserve evidence before the apartment was repaired, a witness moved out of town, and the prices for the repair mounted. However, since there is a governing statute of limitations at issue, O.R.C. §2305.06 which permits fifteen years for a contract action, there must be a clear showing of special circumstances permitting the doctrine to be applied prior to the running of the statutory period. Mr. Lusk fails to

make any showing of special circumstance so as to bar this action by the doctrine of laches.

Finally, Mr. Lusk argues the lease was cancelled by "The Notice to Leave the Premises." However, Ohio Rev. Code §1923.04 requires this action to be taken before a landlord may commence an eviction action against the tenant. If after serving this notice the tenant does not remove himself, then the landlord may commence an eviction action to have the tenant removed. As such, Pache was legally bound to serve this notice upon Mr. Lusk. Since Mr. Lusk removed himself from the apartment there was no need for Pache to commence an eviction action. However, none of these actions acted in anyway to prevent Pache from proceeding against Mr. Lusk for either the rent owing on the remaining term of the lease or for the damage allegedly caused by Mr. Lusk. To the contrary, the express language of the lease permits Pache to recover for damages for a breach of the lease. It states, in pertinent part:

> . . . if said Lessee shall fail to keep and perform any of the terms, agreements, and covenants in this Lease on Lessee's part to be kept and performed; [it shall be the] right of said Lessor to recover from said Lessee all damages occasioned by the default of said Lessee in the performance of any of the covenants of this Lease . . ..

As such, Pache did not relieve Mr. Lusk from liability by posting the "Notice to Leave the Premises."

Accordingly, Lusk's Motion for Summary Judgment is not well-taken and is DENIED.

B. Lusk's December 29, 1995 Motion for Summary Judgment and FAB's March 27, 1996 Motion for Summary Judgment[1]

Mr. Lusk maintains there are no genuine issues of material fact thus making summary judgment appropriate. He alleges an examination of the facts results in the conclusion FAB violated 15 U.S.C. §1692e, the Fair Debt Collection Practices Act and 63 U.S.C. §1341. FAB argues the facts clearly reveal it did not violate the above mentioned federal statutes and, as such, it is entitled to summary judgment.

15 U.S.C. §1692e states in relevant part:

> A debt collector may not use any false, deceptive, or misleading representation or means in connection with the collection of any debt. Without limiting the general application of the foregoing, the following conduct is a violation of this section:
>
> ***
>
> (4) The representation or implication that nonpayment of any debt will result in the arrest or imprisonment of any person....
>
> (5) The threat to take any action that cannot legally be taken or that is not intended to be taken.
>
> ***
>
> (7) The false representation or implication that the consumer committed any crime or other conduct in order to disgrace the consumer.
>
> ***
>
> (9) The use or distribution of any written communication which simulates or is falsely represented to be a document authorized, issued, or approved by any court, official, or agency of the United States or any State, or which creates a false impression as to its source, authorization, or approval.
>
> ***
>
> (13) The false representation that the documents are legal process.
>
> ***

[1]The Court will deal with both motions together since they involve the same issues as to why summary judgment is appropriate.

In the current dispute, Mr. Lusk argues the February 22, 1995 letter sent to him by Mr. Conrad violates subsections four and five where it states, "You could possibly be held liable for criminal damaging as this appears to be an intentional act on your part." However, this refers to his alleged actions resulting in damage to the apartment, not to the money he allegedly owes Pache. As such, subsections four and five have not been violated.

Mr. Lusk also contends the letter was in violation of subsection seven. However, Mr. Lusk fails to produce any evidence demonstrating an intent by FAB to cause Mr. Lusk disgrace.

In regards to subsection nine, Mr. Lusk argues FAB's use of federal and bureau in its name is a violation. However, it is clearly stated on the face of the documents that FAB is a private organization. Therefore, subsection nine has not been violated.

Finally, Mr. Lusk believes FAB's placing "Pache Management Co., Inc. v. Jeffrey W. Lusk" in the "regarding" section of the letter's caption violates subsection thirteen. However, an examination of the documents results in the conclusion there was no false representation of legal process. The case caption in the heading was used as a reference point, to assist the reader in determining what the contents were regarding. It in no way made the document represent legal process.

Mr. Lusk also maintains the use of the fictitious name, "Mr. Taylor," was a violation of the Fair Debt Collection Practices Act. However, FAB argues "Mr. Taylor" is a deskname used to protect the identity of the debt collector. The use of an alias by a debt

collector is acceptable so long as their employer is correctly disclosed. Wright v. Credit Bureau of Georgia, Inc. (N.D. Georgia 1982), 548 F.Supp 591, 597. In the present case, the letter from "Mr. Taylor" clearly reveals FAB as his employer. Mr. Lusk has not produced any evidence establishing an attempt by FAB to conceal what it was when it sent him the letters signed by "Mr. Taylor."

Finally, Mr. Lusk argues 63 U.S.C. §1341 was violated by FAB. Mr. Lusk's entire reasoning for a violation of §1341 rests upon his misunderstanding of the use of account in this action. However, as established above, this is a proper action on an account. As such, FAB has not engaged in activity violating 63 U.S.C. §1341.

Accordingly, Lusk's December 29, 1995 Motion for Summary Judgment is not well-taken and is DENIED and FAB's March 27, 1996 Motion for Summary Judgment is well-taken and is GRANTED.

C. Lusk's January 9, 1996 Motion for Summary Judgment and CBC's February 9, 1996 Motion for Summary Judgment[2]

Lusk maintains he is entitled to summary judgment as a matter of law since there are no genuine issues of material fact. He alleges an examination of the facts results in the conclusion CBC violated the Fair Credit Reporting Act, 15 U.S.C 1681 et seq. (1988) (hereinafter "FCRA"). He specifically points to §1681e(b). However, CBC argues the facts clearly reveal it did not violate §1681e(b) and, as such, it is entitled to summary judgment.

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[2]The Court will deal with these motions together since CBC set forth its arguments for its Memorandum Contra Lusk's Motion for Summary Judgment in its Motion for Summary Judgment.

15 U.S.C §1681e(b) states:

> (b) Accuracy of Report. Whenever a consumer reporting agency prepares a consumer report it shall follow reasonable procedures to assure maximum possible accuracy of the information concerning the individual about whom the report relates.

In order to establish a prima facie violation of §1681e(b), evidence must be presented demonstrating that the credit agency prepared a report which contained "inaccurate" information. Cahlin v. General Motors Acceptance Corp. (11th Cir. 1991), 936 F.2d 1151, 1156.

In the current case, Mr. Lusk has failed to do so. He has not presented anything which shows CBC prepared a report containing inaccurate information. The only thing Mr. Lusk has presented is his own contention he does not owe Pache anything on the remainder of the lease. However, CBC has presented evidence of the measures it took to ensure the report was accurate, including reinvestigating the information when Mr. Lusk questioned it. Therefore, until the resolution of the dispute between Pache and Mr. Lusk, the information contained in Mr. Lusk's credit report is not inaccurate.

Accordingly, Lusk's Motion for Summary Judgment is not well-taken and is DENIED and CBC's Motion for Summary Judgment is well-taken and is GRANTED.

II. Lusk's April 4, 1996 Motion to Dismiss

Mr. Lusk contends Pache is not the real party in interest, thus violating Ohio Civ. R. 17(A). In addition, Mr. Lusk argues O.R.C. §2307.05 and §2307.08 prevent this lawsuit from continuing.

However, both §2307.05 and §2307.08 have been repealed and, as such, are not at issue.

Ohio Civ. R. 17(A) states, in relevant part, "Every action shall be prosecuted in the name of the real party in interest." A party directly benefitted or injured by the outcome of the case is a real party in interest. State ex rel. Botkins v. Laws (1994), 69 Ohio St.3d 383, 387, 632 N.E.2d 897, 902. The test to determine the real party in interest is to examine what party is entitled to damages. Young v. Merrill Lynch, Pierce, Fenner & Smith, Inc. (1993), 88 Ohio App.3d 12, 16, 623 N.E.2d 94, 97.

In the current dispute, it is clear Pache is the real party in interest. As has already been established, this is an action on an account which arises from the breach of the lease agreement entered into between Mr. Lusk, the lessee, and Pache, the lessor. As lessor, Pache is the party entitled to damages for the alleged breach of lease.

Accordingly, Lusk's April 4, 1996 Motion to Dismiss is not well-taken and is DENIED.

III. Lusk's March 6, 1996 Motion for Sanctions

Mr. Lusk seeks to have sanctions imposed upon Pache, pursuant to Ohio Civ. R. 37(D), for its alleged failure to have Terry McFadden, Ericka Stevens, Steve Cameron, Chad Seevers and Carl Church appear for depositions on Wednesday, February 21, 1996. However, the very language of Mr. Lusk's Notice of Deposition defeats his Motion for Sanctions. The Notice of Deposition states, "The Plaintiff's are requested to choose...." As such, when Pache

appeared at the deposition with Paul Herried, who was an individual listed in the Notice of Deposition, it complied with Mr. Lusk's request.

Accordingly, Lusk's March 6, 1996 Motion for Sanctions is not well-taken and is DENIED.

IV. Motions for Leave to Amend Pleadings

Ohio Civ. R. 15(A) provides that "[l]eave of court shall be freely given when justice so requires." Leave to amend should be granted unless the Court specifically finds that the proposed amendment is done in bad faith, is unduly delayed or is intended to prejudice the opposing party. Hoover v. Sumlin (1984), 12 Ohio St.3d 1, 6, 465 N.E.2d 377, 381.

The language of Civ. R. 15(A) favors liberal policy when a party files a motion for leave to amend a pleading with the trial court. Wilmington Steel Products, Inc. v. CEI Co. (1991), 60 Ohio St.3d 120, 121-122, 573 N.E.2d 622, 624. Further, the trial court's discretion to allow leave to file an amended pleading will not be disturbed in the absence of "gross abuse" by the trial court. Spacewalk v. McDole (1984), 15 Ohio St.3d 62, 63, 472 N.E.2d 347, 348.

A. Lusk's February 21, 1996 Motion for Leave to Amend Counterclaim

In the instant action, Mr. Lusk seeks to amend the counterclaim against Pache in order to add a claim for an alleged violation of 15 U.S.C. §1681h. The amended pleading does not appear to be proffered in bad faith. In addition, Pache has failed to demonstrate that either prejudice will occur or that the

proposed amendment is unduly delayed. Accordingly, Lusk's Motion for Leave to Amend Counterclaim is well-taken and is GRANTED.

B. Lusk's February 21, 1996 Motion for Leave to Amend Third-Party Complaint

In the current dispute, Mr. Lusk seeks to amend the third-party complaint against CBC in order to add a second and third cause of action for alleged violations of 15 U.S.C. §1681h(c) and 15 U.S.C §1681i(a)(b)(c) and (d). The amended pleading does not appear to be proffered in bad faith. In addition, CBC has failed to demonstrate that either prejudice will occur or that the proposed amendment is unduly delayed. Accordingly, Lusk's Motion for Leave to Amend Third-Party Complaint is well-taken and is GRANTED.

C. Lusk's March 27, 1996 Motion for Leave to Amend Third-Party Complaint

In the instant action, Mr. Lusk seeks to amend the third-party complaint against CBC in order to add a fourth claim for violations of 15 U.S.C. §1681(b)(n) and (q). The amended pleading does not appear to be proffered in bad faith. In addition, CBC has failed to demonstrate that either prejudice will occur or that the proposed amendment is unduly delayed. Accordingly, Lusk's Motion for Leave to Amend Third-Party Complaint is well-taken and is GRANTED.

V. Lusk's December 12, 1995 Motion for Order with Respect to Answers to Admissions

Mr. Lusk seeks to have "answers of a proper nature" submitted for Request for Admissions 1(c) and (n). He argues the answers given by FAB are not in conformity with Ohio Civ. R. 36(a). FAB

counters that Request for Admission 1(c) violates the attorney-client privilege and 1(n) is defectively drafted.

Ohio Civ. R. 36(a) states, in pertinent part:

> ***
> The answer shall specifically deny the matter or set forth in detail the reasons why the answering party cannot truthfully admit or deny the matter.
> ***

As to Request for Admission 1(c), FAB's answer "Unable to answer" does not conform with Ohio Civ. R. 36(a). If FAB is unable to answer on the basis of the attorney-client privilege, it should have specifically set this forth in its answer. However, as to Request for Admission 1(n), it is drafted in such a manner as to make a response impossible, which FAB indicated in its response.

In addition, Mr. Lusk asserts he should be awarded attorney's fees in the amount of $285.00 for expenses incurred in relation to his Motion for Order with Respect to Answers to Admissions. Ohio Civ. R. 37(A)(4) provides for the awarding of expenses if a discovery motion is granted "unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust." Upon review of the facts and circumstances in the instant case, the Court finds an award of attorney's fees to Mr. Lusk would be unjust.

Accordingly, Lusk's Motion for Order with Respect to Answers to Admissions as to Request for Admission 1(c) is well-taken and is GRANTED and is DENIED as to Request for Admission 1(n). FAB is directed to amend its answer, specifically stating the attorney-

client privilege prevents it from truthfully admitting or denying the matter.

IT IS SO ORDERED.

DEBORAH P. O'NEILL, JUDGE

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